

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 15TH DAY OF DECEMBER 2015/24TH AGRAHAYANA, 1937

CRL.A.No. 1402 of 2006 ()

**AGAINST THE JUDGMENT IN SC 1796/2001 of ADDITIONAL SESSIONS COURT FAST
TRACK (ADHOC)-II, THIRUVANANTHAPURAM DATED 06-04-2006**

APPELLANT(S)/ACCUSED:

**ANIL KUMAR, AGED 42 YEARS,
S/O.GOPINATHAN, SHEELA MANDIRAM, THALIKUZH
ANAKUDIMURI, VAMANAPURAM VILLAGE.**

**BY ADVS.SRI.P.V.ANIL
SMT.R.PADMAKUMARI**

RESPONDENT(S)/COMPLAINANT:

**STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.**

BY PUBLIC PROSECUTOR SMT. LILLY LESLIE

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 15-12-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

Crl.A. No. 1402 of 2006

Dated this the 15th day of December, 2015

J U D G M E N T

The accused was prosecuted for the offence punishable under Section 58 of the Abkari Act. He was found guilty. He was therefore convicted and sentenced to suffer rigorous imprisonment for 1½ years and to pay a fine of ₹1 lakh with a default clause of simple imprisonment for a further period of 4½ months.

2. The facts as could be discerned from the records are as follows:

PW2 was functioning as the Preventive Officer of Vamanapuram Excise Range at the relevant time. On 12.04.1999, he and his team of officers had gone on routine patrol duty. When they reached Kanjirappara, they happened to see the accused coming along the road carrying a can. Seeing the excise officials, he became nervous and tried to conceal himself. Feeling suspicious, he

was intercepted and the can was seized from his possession. Contents thereof was identified as arrack by smell and taste. The can contained about 2½ litres of arrack. The accused was arrested as per Ext.P2 arrest memo. Ext.P1 is the mahazar prepared at the spot. Thereafter the accused, the seized articles and the records were produced before the Excise Inspector. PW4 was functioning as the Excise Inspector of Vamanapuram Range. At about 7.00 p.m., on the date of incident, PW2 produced the accused, the seized articles and the documents before him and he received the same. He, on that basis, registered crime as per Ext.P3 occurrence report. He prepared Ext.P4 property list and he sent a requisition to the court seeking to have the sample taken and forwarded for chemical analysis. That is Ext.P5. PW5 conducted investigation in the case. After obtaining Ext.P5 Chemical Analysis Report, he completed investigation and laid charge before court.

3. The court before which the final report was laid, took cognizance of the offence and finding the offence to be exclusively triable by a Court of Sessions, committed the case to Sessions Court, Thiruvananthapuram under Section 209 of Cr.P.C. after following the necessary procedures. The said court made over the case to Additional Sessions Court, Fast Track (Adhoc)-II, Thiruvananthapuram, for trial and disposal.

4. The latter court, on receipt of records and appearance of the accused before the said court, framed charge for the offence punishable under Section 58 of the Abkari Act.

5. To the charge the accused pleaded not guilty and claimed to be tried. The prosecution therefore had PWs 1 to 6 examined and had Exts.P1 to P6 marked. MO1 was got identified and marked.

6. After the close of prosecution evidence, the accused was questioned under Section 313 Cr.P.C. He

denied all the incriminating circumstances brought out in evidence against him and maintained that he is innocent.

7. Finding that he could not be acquitted under Section 232 Cr.P.C., he was asked to enter on his defence. He chose to adduce no evidence.

8. Impressed by the evidence of PWs 2 and 3 and also the contemporaneous document namely, Ext.P1 mahazar which contains all the details, the court below found the accused guilty of the offence levelled against him. Conviction and sentence followed.

9. Assailing the conviction and sentence, the learned counsel appearing for the appellant raised two main points for consideration. It is pointed out that the forwarding note does not contain the specimen sample seal and that is fatal to the prosecution. For the above proposition, he relied on the decisions reported in **Joseph v. State of Kerala** (2009 (4) KHC 537), **Majeedkutty v. Excise Inspector** (2015 (1) KLT 624) and **Krishnan v. State** (2015 (2) KLT SN 8). The

second ground urged before this Court is that the sample was already taken from the court, in which case, it is absolutely necessary to examine the Thondi Clerk, who had taken the sample as per the orders of the learned Magistrate. That has not been done in the case on hand. So it is not known as to who had taken the sample, from where it was taken and when it was taken. This is also fatal to the prosecution. In these two grounds, it is contended that the appellant is entitled to succeed.

10. The learned Public Prosecutor on the other hand tried to sustain the conviction and sentence by relying on the evidence of PWs 2 and 3 and pointed out that their evidence taken along with Ext.P1 lead to irresistible conclusion that the accused was in possession of the contraband article. If that be so, technicalities shall not stand in the way of convicting the accused. Therefore the conviction has only to stand.

11. It is difficult to accept the contentions raised by the learned Public Prosecutor. Certain norms and standards have been set for finding the accused guilty in such cases. Those standards cannot be bypassed . The learned counsel for the appellant is perfectly justified in his submission that for want of specimen seal in the forwarding note, the prosecution has to fail.

12. In the decision reported in **Joseph v. State of Kerala** (2009 (4) KHC 537), it was held as follows:

“18. Yet another infirmity in the prosecution case is that there is no request forwarding note either produced or marked to indicate that a request was made to the Magistrate to send the sample bottle to the chemical examiner for analysis. P.W.6 who conducted the investigation, has no case that he had made any such request or had filed any forwarding note. Likewise, P.W.1 also has no case that he had made a request to the Magistrate to send the sample bottle to the chemical examiner. Ext.P4 certificate of chemical analysis dated 24.11.1997 is relied on by the prosecution to show that the sample bottle was duly

despatched to the chemical examiner for analysis. In the absence of any forwarding note or requisition, it is not explained as to how the Magistrate forwarded a sample bottle to the chemical examiner as per his covering letter dated 19.8.1997 referred to in Ext.P4 certificate. Even the office copy of the covering letter has not been produced. The thondi section clerk who was the custodian of the properties before the Magistrate, was not examined to prove matters such as the date of receipt of the property before the Magistrate, the condition in which those properties were received in court including the fact whether a sample bottle was received and if so, whether the seals if any on such bottle were in tact, the date of despatch of the sample to the chemical examiner and the nature of the custody of the sample bottle until then. The prosecution can succeed in securing a conviction against the appellant only if it is shown that the sample which was subjected to chemical analysis as evidenced by Ext.P4 certificate was the very same sample which was drawn from the bulk quantity of contraband liquor allegedly held by the accused and which after change of hands, eventually reached the hands of the chemical examiner."

13. In the decision reported in **Krishnan v. State** (2015 (2) KLT SN 8), it was held as follows:

“Ext.P5 is a copy of the Forwarding Note submitted before the court for sending sample for subjecting it to chemical analysis. A specific space is provided in the Forwarding Note for affixing the sample seal. No such sample seal was affixed on Ext.P5. Whether the sample seal was affixed on the original of Ext.P5 sent to the Chemical Examiner? Normally, if the sample seal is not appearing in the copy of the Forwarding Note, in this case it is Ext.P5, it has to be presumed that such sample seal was not affixed on the original Forwarding Note unless proved otherwise. A copy of the Forwarding Note is kept in the office of the court for serving certain purposes. The purposes are evident from the contents of the form of the Forwarding Note itself. They include the quantity and description of the sample drawn from the bulk of the contraband, the details of the case and the space for providing the sample impression of the seal affixed on the sample taken from the bulk of the contraband. Therefore, as already stated, the absence of sample seal in the space provided in the copy of the Forwarding Note is sufficient reason for presuming that the sample seal is not provided in

the original Forwarding Note. Of course, this is only a rebuttable presumption. In the case on hand, such presumption has not been rebutted by the prosecution.”

14. In the decision reported in **Majeedkutty v. Excise Inspector** (2015 (1) KLT 624), it was held as follows:

“7. It is the prosecution case that the bulk of the contraband as well as the sample collected were sealed by PW3. PW3 also deposed that they were so sealed. The description in the List of Property does not show that the bulk was so sealed. Be that as it may, the sample is described in the List of Property as sealed. Whose seal was so affixed? No evidence is available regarding that aspect of the matter. It is noted in Ext.P3 Certificate of Chemical Analysis that the seal on the bottle was intact and found tallied with the sample seal provided. Whose sample seal was so provided? None of the excise officials examined in the case deposed that sample seal was so provided. No Forwarding Note is seen among the case records. PW4 deposed before the court that he had submitted a requisition before the court for subjecting the sample to Chemical Analysis. It is usual that seal of the court will be affixed while sending the sample to the Chemical Examiner for

analysis. Therefore, the sample seal noted in Ext.P3 can be the seal of the court also. A comparison of the seal of the court affixed on the bottle containing sample with the specimen seal of the court will not give any assurance that the sample of the contraband allegedly seized from the appellant has, in fact, reached the Chemical Examiner for analysis. Such an assurance is possible only when the sample seal of the seal affixed on the sample was provided to the Chemical Examiner for comparison. Such a link evidence is missing in this case. Therefore, there is no assurance that the Chemical Examiner examined really the sample taken from the bulk allegedly seized from the appellant in this case. Hence, the report in Ext.P3 that ethyl alcohol was detected in the sample will not connect the accused with the crime alleged.

8. This Court in *Rajamma v. State of Kerala* (2014 (1) KLT 506) has held as follows:

“ The investigating officer has also deposed that he is not aware whether any specimen seal is produced before the court. So, absolutely there is no evidence to convince the court that the prosecution has proved that the sample seal or specimen impression of the seal, alleged to have been affixed in the sample by PW.1 has been provided to the chemical examiner for their verification and to ensure that the sample seal, so provided, is tallying with the seal affixed on the sample bottle. In spite of the

above fact and in the absence of sample seal, however in Ext.P3, it is certified that the seal of the sample bottle is in tact and tallied with sample seal provided. Therefore, according to me, no evidentiary value can be given to Ext.P3 chemical analysis report. In the absence of any link evidence to show that the very same sample which drawn from the contraband article allegedly seized from the possession of the accused reached the hands of the chemical examiner, it is unsafe to convict the appellant who is a lady.”

A Division Bench of this Court in *Ravi v. State of Kerala* (2011 (3) KLT 353) has held that the prosecution can succeed only if it is shown that the contraband liquor which was allegedly seized from the accused ultimately reached the hands of the Chemical Examiner in a tamper-proof condition. Also held that no conviction can be entered against the accused in a prosecution unless it is proved that the sample which was analysed in the Chemical Examiner's Laboratory was the very same sample drawn from the contraband liquor allegedly found in the possession of the accused.”

15. In the light of the above decisions, it is unnecessary to discuss the significance and importance of specimen sample seal to be affixed on the forwarding note and its marking before court. This Court feels that, that is

the only guarantee to ensure that the sample sent for chemical analysis is the sample taken from the contraband seized from the possession of the accused. The absence of either specimen sample seal or the non-marking of the forwarding note turned to be fatal to the prosecution. Equally formidable is the second ground urged before this Court.

16. PW2, who was the Detecting Officer, has not taken any sample at the spot and he has seized the entire can and sealed and send it to court. PW6 says that he sent a requisition to the court seeking to have the sample taken and forwarded for chemical analysis. It is well settled by now that in such cases, it is absolutely necessary to examine the Thondi Clerk, who had taken the sample as per the orders of the learned Magistrate. In this case, that has not been done. It means that there is no authenticity for the sample which is said to have reached in the laboratory. For the above two grounds, the appellant will have to succeed.

For the above reasons, this appeal is allowed. The conviction and sentence passed by the court below are set aside and the accused stands acquitted of all charges levelled against him. His bail bond shall stand cancelled and he is set at liberty.

Sd/-
P.BHAVADASAN
JUDGE

ds

//True copy//

P.A. to Judge